

BLANK PAGE

76

FILED

Office - Supreme Court, U. S.
FILED
MAR 24 1941
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1940,
No. 601.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of Wilbur J. Downey, also known as
W. J. Downey,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent,

RESPONDENT'S BRIEF.

HIRAM E. CASEY,
535 Rowan Building, Los Angeles,
Attorney for Respondent.

HORACE W. DANFORTH,
1111 Pacific National Building,
Los Angeles,
Of Counsel.

BLANK PAGE

SUBJECT INDEX.

	PAGE
Respondent's position in this proceeding.....	2
Regarding the facts of this case.....	6
Assumptions indulged by petitioner.....	9

I.

Since respondent's claim is not against the bankrupt, or against his bankrupt estate, section 64 of the Bankruptcy Act has, and can have, no application.....	14
---	----

II.

Imperial having demanded to deal with a corporate entity before it would deal at all, that entity having been organized in accord with such demand, and Imperial's subsequent dealings having been with such entity exclusively, Imperial had, as that corporation's sole creditor at the time of the bankruptcy, an equitable lien or charge on all the assets of the corporation, which lien or charge, resulting from the undertakings and dealings of the parties, was superior to any right which the trustee in bankruptcy could obtain in any manner.....	15
--	----

III.

Downey's sale in 1936 to the corporation, of which notice was duly recorded, if fraudulent at all, was so only in respect to then existing creditors, who, however, must act with due diligence if they would protect themselves against the intervening rights of subsequent creditors; and since Standard, which was then the only creditor, with full knowledge of the sale, did nothing prior to 1938 to challenge such sale or seize the property transferred, but, on the contrary, received substantial sums upon its claim, it was estopped in 1938 to question the transaction in 1936 and so was the trustee, while Downey's recent creditors had no standing at all.....	24
---	----

IV.

Since the trustee's proceeding was merely to determine that the corporation was Downey's alter ego, and Imperial was not made a party whereby it was or could be adjudicated that, as to Imperial, the corporate entity should be disregarded, the proceeding had was in no sense per se the equivalent of an action under section 70-e, to recover assets of the bankrupt, exclusively for the benefit of the bankrupt estate..... 32

TABLE OF AUTHORITIES CITED.

CASES.

CASES.	PAGE
Alleman Hdw. Co., In re, 158 Fed. 119.....	27, 29
Buffum v. Barceloux, 289 U. S. 227, 77 L. Ed. 1140.....	25
Carroll v. Stern, 223 Fed. 723.....	27
Delaney etc. Co. v. Crystal etc. Co., 88 Cal. App. 784.....	20
Fogg v. Blair, 133 U. S. 534, 33 L. Ed. 721.....	26
Hall v. Cayot, 141 Cal. 13.....	17
Hollins v. Briarfield C. & I. Co., 150 U. S. 371, 37 L. Ed. 1113	20
Hurley v. Atchison, T. & S. F. Co., 213 U. S. 126, 53 L. Ed.	
729	20
Mallow v. Hinde, 25 U. S. 193, 6 L. Ed. 499.....	3
McColgan v. Bank of California, 208 Cal. 329.....	17
Pepper v. Litton, 308 U. S. 295, 84 L. Ed. 281.....	5, 20
Plattville etc. Co., In re, 147 Fed. 828.....	14
Routt Lbr. Co., In re, 59 Fed. (2d) 29 (C. C. 9).....	27
Thompson v. Fairbanks, 196 U. S. 516, 49 L. Ed. 577.....	30
Tressler, In re, 20 Fed. (2d) 663.....	14
United States v. Butterworth-Jordan Corp., 267 U. S. 387, 69	
L. Ed. 672.....	17
United States F. & G. Co. v. Sweeney, 80 Fed. (2d) 235.....	22
White v. White, 11 Cal. App. (2d) 570.....	19
Willis v. Lauridson, 161 Cal. 106.....	3
Zitron, In re, 203 Fed. 79.....	14

STATUTES.

Bankruptcy Act of 1938, Sec. 1 (10) and (20).....	10
Bankruptcy Act of 1938, Sec. 2	10
Bankruptcy Act of 1938, Sec. 38	10
Bankruptcy Act, Sec. 64.....	14
Bankruptcy Act, Sec. 70-d, Subd. (1).....	31
Bankruptcy Act, Sec. 70-e.....	9, 10, 11
Civil Code, Sec. 3431.....	26
Civil Code, Sec. 3440	15, 25

TEXTBOOKS AND ENCYCLOPEDIAS.

16 California Jurisprudence, Sec. 10, pp. 307-308.....	16, 18
18 Standard Encyclopedia of Procedure, Sec. C, p. 1000.....	19
4 Thompson on Corporations, 2d Ed., 39, Sec. 3421.....	20

BLANK PAGE

IN THE
Supreme Court of the United States

October Term, 1940,
No. 601.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the
Estate of Wilbur J. Downey,

Petitioner,

vs.

IMPERIAL PAPER AND COLOR CORPORATION,

Respondent,

RESPONDENT'S BRIEF.

In what follows, the parties will, in general, be referred to as petitioner and respondent. If the creditor Standard Coated Products Corporation (formerly The Standard Textile Products Company) is referred to, it will be called "STANDARD"; and, in many instances for clarity, the respondent will be designated as "IMPERIAL". The Downey Wall Paper and Paint Co. will be called the Downey Co. Any emphasis appearing is supplied, unless otherwise specifically credited.

The method of the brief renders difficult any logical treatment of its matters. It proposes (p. 13) three "Questions Involved Here", which are apparently deemed the equivalent of the statements made in the petition (pp. 12-13), claimed to justify certiorari. But these "Questions" are not thereafter dealt with, *eo nomine*. Instead, the "Argument" proceeds piecemeal, upon a series of de-

tached topics (pp. 14 *et seq.*). These are not exclusive of one another, but involve much repetition. Neither do they state any legal proposition which, if sustained on the facts, would require the exercise of this court's power in certiorari. They constitute a series of arguments about what content the record has, how that content should be interpreted, and how the Circuit Court "fell into error, partly through a misconception of facts" (p. 67). Numerous authorities are cited throughout. But none will be found applicable to support petitioner. Still less do any such establish "conflicts". Any answer to such a presentation must, necessarily, be along lines drawn to meet it.

The "Questions Involved", above mentioned, are themselves merely "feigned issues", based upon a non-existent record.

Respondent's Position in This Proceeding.

Respondent contends in this court that the propositions sought to be supported by the petitioner are wholly baseless and without foundation,—in the facts of this case. The considerations of this brief are submitted to establish the validity of this position.

This was made the general ground of answer (pp. 1-4, 9) to the petition for certiorari. But, since the writ was granted, respondent deems it its duty to amplify the points of that answer.

It is first respectfully submitted that petitioner's "Statement of Facts" runs much to assumption, conclusion, and innuendo; and that it is incomplete, highly colored and exaggerated, and largely based on matters which are no part of the record.

The "record" here. Regarding this latter particularly, petitioner says (p. 47), that the Findings and Conclusions of the Referee in connection with the order of *April 7, 1939*, are "*a part of the record here*". While printed in the transcript, it is respectfully submitted that they are, nevertheless, *no proper part* of the record. No amount of attachment to, or inclusion in, a *transcript* can make anything a part of that *record*, if it is not legally competent to be such.

On the oral argument before the Circuit Court, May 1, 1940, petitioner repeatedly brought the matter of these "Findings", etc., into consideration. He finally obtained leave to file the same with the court, but this was subject to the *objection* of respondent's counsel (Mr. Casey) [Tr. p. 75]. It appears the matters referred to were so filed the following day, *May 2, 1939* [Tr. pp. 102, 117]. But the Circuit Court's opinion *states* the contents of the record, and *limits* it to that "*filed on January 17, 1940*", and "*a supplemental record filed on July 12, 1940*" [Tr. p. 201, Note 1]. It is submitted this action by the court clearly constituted a *sustaining* of the objection made by respondent's counsel. The court further manifested its position in respect to the matter in these "Findings", when it stated in its opinion that "*appellant (respondent here) was not a party to the order of April 7, 1939*", and "*was not bound thereby*" [Tr. p. 209]. Furthermore, such is elementary. No party can be bound by any proceeding, without his "day in court". (*Willis v. Lauridson*, 161 Cal. 106, 117, quoting *Mallow v. Hinde*, 25 U. S. 193, 198, 6 L. Ed. 499.) If the order itself is not binding, any "Findings and Conclusions" on which that order is based, necessarily cannot be admissible as *evidence* against the party not bound;—in this instance, the present respondent.

Petitioner himself formerly so thought. During Downey's testimony in this case [Tr. pp. 39-67], petitioner referred to portions of "the transcript of your testimony", "on the question of *alter ego*" [Tr. p. 43], and quoted therefrom [Tr. pp. 43-47], purportedly for *impeachment* purposes, and respondent promptly objected "as to the *evidence*" "as *not binding on us*" [Tr. p. 47]. Otherwise, the Downey "evidence", or the "Findings" in the "*alter ego*" matter, were never mentioned. Manifestly, if petitioner had *then* thought as he now claims, he would at least have tendered the "Findings" in evidence, to which respondent could, then, have interposed his objection. It was only *later*, when the Referee's certificate was made up, that resort was had to the device of "judicial notice" [Tr. p. 23],—in complete disregard of the applicable law, in view of the Referee's previous certification that "IMPERIAL . . . was *not a party* to said fraudulent conveyance proceeding" [Tr. p. 21].

But more than that. In his brief in the Circuit Court, the petitioner (appellee there) made the following admission (p. 23):

"In so far as the order of April 7, 1939, *binding* the appellant here was concerned, *we do not contend that it was res adjudicata*, and *never have*. It was rendered in a *summary proceeding* to which the *bankrupt and his corporation* were parties."

The "bankrupt and his corporation" might well be bound; but the corporation's *creditors* could *never* be. This would necessarily follow from the legal principle

controlling who is *bound* in a proceeding, which is stated in the ruling of the Circuit Court already noted [Tr. p. 209]. Here, it is to be particularly noted, petitioner admits, in his *present* brief, that "Imperial * * * (is) the only existing unpaid creditor of the Downey * * * Co." (p. 46). And the Referee expressly so found in his order in this case [Tr. p. 35].

It was only in his argument, and in his "Petition for Rehearing", in that court, that, as here, petitioner *reversed* his position, and relied heavily on the "Findings" (pp. 6-7, 10, 12-22);—claiming that respondent is to be bound thereby. But it was *not* "through error", that the "Findings, etc." were *omitted* from "the transcript of record sent to the Circuit Court of Appeals", (p. 47). They could perform no function there, as petitioner, *at that time*, agreed,—evidence his brief, *supra*.

Petitioner himself cites authority showing the ground or defect in his "*alter ego*" proceeding and order, as "*res adjudicata*" against *this* respondent. (*Pepper v. Litton*, 308 U. S. 295, 302-303, 84 L. ed. 281, 287.)

It is finally submitted it is abundantly clear that the "Findings", concerning which petitioner says so much throughout, are wholly *immaterial* in the present proceeding. For this reason, the considerations appearing in the petitioner's brief, pages 47-61 particularly, merit no further attention. These same matters, in almost identical terms, were included by petitioner in his "Petition for Rehearing" in the Circuit Court (pp. 12-22); and also in the petition here (pp. 25-39).

Regarding the Facts of This Case.

It is respectfully submitted that the Circuit Court in its opinion aptly states both the case itself [Tr. pp. 200-201] and all the essential facts of this controversy [Tr. pp. 201-207], and to avoid unnecessarily burdening this brief, the Court is respectfully invited to consider the same as representing the basic facts. However, in view of certain of the petitioner's claims, some of the matters covered in the Court's statements will be somewhat amplified, in order, to bring out even more clearly the extent to which petitioner indulges in assumption, as the bases of his various contentions.

Imperial's claim and petition. In view of some of petitioner's contentions, it is important to bear in mind the precise content of the claim and petition of IMPERIAL when it first sought relief against the Respondent Trustee. In its "*Claim*", it set forth that, it "claims and asserts a claim by priority against the assets of the said Downey Wall Paper and Paint Company and against the proceeds thereof"; and further, that "said claim, as a prior claim, has a prior right to distribution of the funds in the hands of the said trustee so received by him from the sale, or otherwise, of the assets of the Downey Wall Paper and Paint Co. a corporation" [Tr. p. 9]. Likewise, in the "*Petition*", IMPERIAL states that, it "respectfully claims and asserts that it has a claim and a right to have the assets of the Downey Wall Paper and Paint Co. or the proceeds thereof, applied to the payment of its obligation against the said Downey Wall Paper and Paint Co., and claims and asserts a right to have the said payment due it as the creditor of the said Downey Wall Paper and Paint Co., prior to and in advance of any payments or

distribution out of the proceeds thereof"; and further, "alleges and claims as such creditor an equitable lien upon the assets and funds or moneys so received from the sale or disposition of the assets of said Downey Wall Paper & Paint Co., a corporation"; and further, "claims a prior right to distribution of the moneys or funds in the hands of the Trustee so received by him from the sale, or otherwise, of the assets of" the said corporation [Tr. p. 16]. The foregoing makes it abundantly clear that IMPERIAL never claimed as a creditor of the bankrupt estate, either in his claim, or in his petition. Also it is clear that claim and petition are identical, in content and meaning. Always, it was made more than clear that IMPERIAL'S rights were based entirely upon the fact that it was the creditor of the corporation, and no one else; and was, thereby, entitled to the benefit of any assets in the hands of that corporation, before any other party or parties claiming through the bankrupt estate, could claim any rights whatever as against such assets. In this regard, respondent IMPERIAL has never changed its position; and that position it now maintains.

IMPERIAL'S "fraud". In view of the petitioner's insistent and repeated assertion that IMPERIAL was a party to the fraud, if any, of Downey in 1936, when he transferred a portion of the assets of his then business to the newly organized corporation, the Downey Company, it is necessary to amplify the statement of the Circuit Court as to the fact in that regard. The only evidence in the record, touching the relation of Imperial to the incorporation of the Downey Company, appears in a very few pages of the present record [Tr. pp. 41-44, 45, 48] and in certain exhibits offered by the petitioner trustee on the hearing in this case, which also appear in the record [Tr.

pp. 50-55]. This record shows that Downey conferred with IMPERIAL in April, 1936, regarding his procuring of an agency for its products. His financial situation was then discussed, and the several courses open to him under the circumstances,—including the organization of a corporation,—a separate “entity to deal with”,—were considered [Tr. pp. 41, 44]. But, in that connection, any “suggestion” on the part of IMPERIAL did *not contemplate* that the corporation, if one should be formed, *should necessarily have any assets* [Tr. pp. 43, 44]. “They were selling me on my personal reputation” [Tr. p. 44]. The gist of the contents of the trustee’s exhibits can indicate no more than that Downey’s attorney, Hutton, was first advising IMPERIAL that Downey had decided to organize a corporation, along lines stated in the first letter; and the second letter, with equal certainty, merely informs IMPERIAL that the new corporation is now in position to do business on its own behalf, as the separate “entity” that IMPERIAL had demanded,—before it would deal at all. IMPERIAL had no connection with, or interest in, the corporation, save and except to sell its goods and collect the purchase price thereof,—for *more than two years* before the bankruptcy of Downey.

Petitioner has heretofore attempted to read sinister meanings into these two letters, and has argued that they disclose elements of fraud on the part of respondent. Such are but contentions made in desperation. It is submitted that no such things can reasonably be deduced from either or both of the letters. They afforded IMPERIAL *information*; nothing more.

With its statement of facts thus amplified, the opinion of the Circuit Court, as above referred to, adequately furnishes the necessary factual basis.

Assumptions Indulged by Petitioner.

Throughout his brief, it appears that petitioner asserts with positiveness certain conclusions which are merely assumed by him, and which have no factual support. The more important of these will be enumerated,—still further to clear the way for coming considerations.

1. "*Assets not the bankrupt estate.*" On the first page of the brief, he asserts that the funds now in his hands are "assets" "belonging to the bankrupt estate." By the true state of the facts in this record, pointed to above, it is clear that the funds the trustee holds are not assets "of the bankrupt estate", but, at the very most, are funds against which he *might* hereafter make and sustain a claim, if there should be any *surplus* over and above the amount of those funds necessary to satisfy the claim of this respondent. The "assets" in question were those of the *corporation*, and no one else. Petitioner *admits* as much (p. 64). On the same page, he cites numerous decisions of this court which show that "*surplus*" is the controlling factor under such circumstances.

2. *Section 70-e.* Likewise on the first page, and also subsequently (pp. 9-10; 64-66), petitioner assumes and states that said funds came into his hands through "a recovery", "under the provisions of Section 70^d of the Bankruptcy Act". This further assumes that the proceedings had to obtain the order of "*alter ego*" of April 7, 1939, were the same as, or constituted some fair equivalent of, the proceedings contemplated by the said Section 70-e.

Such cannot, of course, be true. That section contemplates an action for the *direct recovery* of assets of the *bankrupt estate*; not some proceeding to establish the "*alter ego*" character of a *corporation*, the legal entity of

which may or may be *disregarded*, according to what the particular circumstances demand.

But those circumstances must be established by evidence, with *all' parties* in interest properly before the court. An all-sufficient answer to the contention lies in the fact that IMPERIAL was *not a party* to the proceeding. For complete disproof of his theory, however, petitioner himself affords the evidence, on pages 64-66 of his brief. He there pleads that the proceeding mentioned was one which *ought* to be sustained, under Section 70-e, because it *avoided* the "*circuitous procedure*" required by the section aforesaid; and that "the Referee simply exercised his *equitable powers*", in making the orders appearing,—decreeing "*alter ego*", and including the orders to seize upon the assets of the *corporation* and to sell them for the benefit of the *bankrupt estate*. But petitioner points to no fraud, injustice, or inequitable results, such as would justify any *disregard* of the corporate entity. In this connection, and anterior to the passage from which the foregoing was quoted, petitioner makes the following admission: "*There is no question but that title to all of the property in the possession of the Downey Wall Paper & Paint Co. was vested in the corporation*" (p. 64).

It is particularly noticeable that petitioner does not consider, or even mention, the Circuit Court's ruling and citations regarding *disregard* of the "corporate legal entity" [Tr. pp. 209-210]. Nor does he show how a *referee* can possess "*equitable powers*". A referee is not a "judge" of a "court of bankruptcy". (Act of 1938, sec. 1 (10) and (20); secs. 2 and 38). Very clearly, Section 70-e of the Bankruptcy Act has nothing to do with this case. Petitioner himself did not think so,—until *after* the adverse decision in the Circuit Court. In his appellee's brief

there, he recognized that Section 70-e required an action in a state court, or in a Federal court "on the law side under Section 70-e of the Bankruptcy Act against the Downey Wall Paper and Paint Co." (pp. 13-14), and only argued as he does here, that the "summary proceeding" brought was a fair substitute.

3. IMPERIAL'S "fraud" and "conspiracy". Petitioner further assumes that IMPERIAL was involved in the alleged fraud of Downey, in connection with the transfer of a portion of his stock in trade to the new corporation in 1936. This theory works through a series of stages. It is first said that IMPERIAL merely "suggested" that a corporation be formed (Brief, p. 3). Very soon, however, this grew into an "instigation", on the part of IMPERIAL, not only to form the corporation, but also to take over "all his wall paper and paints" (Brief, p. 4). It grew still further, and finally developed into a "participation", and "the perpetration of the fraud" (Brief, p. 5). Thereafter, through the brief, IMPERIAL is assumed to be fully convicted as a fellow conspirator with Downey, and to be conclusively branded with fraud. Such assumption is wholly without any basis whatever in any of the evidence. It rests wholly upon the facts, that IMPERIAL "suggested" a corporation might be formed, as a "separate entity to deal with",—else it would not deal at all; that in June, 1936, it was advised such a corporation had been organized, with assets derived by transfer from Downey, (which latter IMPERIAL had not suggested or cared anything about); and that it thereafter did an extensive business with the corporation, for more than two years (pp. 3-6, 11). All while STANDARD, with knowledge of the corporation, was continuing to deal with Downey, receiving very substantial sums of money on

its account, and meanwhile, questioned nothing that had been done. These *latter* facts, petitioner does *not* bring out. Very clearly, IMPERIAL was guilty of no fraud.

4. *The amount of the "promissory note"*. Petitioner further assumes that, somehow, there is a promissory note for \$14,000, or for \$14,194.72 as it is frequently described, involved in this case. This initiates on page 6 of the brief, and thereafter persists throughout. It is strikingly significant however, that petitioner does not point to any such note, anywhere in the record. Nor is it anywhere therein stated that any such note actually existed; nor is any such note ever recognized. It does not even appear in the "Findings" which petitioner desires to have considered by this court. No such note is stated to exist, by the Referee in his Findings in this case; and, on the contrary, in his order herein he expressly finds that IMPERIAL "is the *only creditor* of (the Downey Company), a corporation". This it could not be, if Downey's note or any part thereof, still remained outstanding. Also, as pointed out by the Circuit Court in its opinion [Tr. p. 205], that court notes that, in the schedules of the bankrupt, Downey, no promissory note of any amount appeared among his assets.

Instead of showing any specific existence of such a note, petitioner undertakes to argue that such *must* have had existence by reason of certain parts of the record, to which he draws attention (pp. 5-7, 52, 54-55). By this record it appears that on the hearing in this case, Downey was asked if he had transferred "\$14,000 worth" of his stock in trade to the newly organized corporation. He answered that he had, and "took a *promissory note*" on which "5,000 was paid in *cash*". It is noticeable that he was not asked what the *amount* of that

note had been. Nor was he asked, *how* he had made payment *other* than in cash. Beyond this, petitioner refers (p. 52) to the "Trustee's Exhibit No. 2", in which the bankrupt's attorney, Hutton, advised IMPERIAL that stock would be purchased from Downey "*at inventory*", and also points (p. 55) to the testimony of Downey, just mentioned. Upon *this* basis, petitioner argues that both Hutton and Downey intended to say, and said—and a reasonable, indeed a necessary conclusion is—that the "promissory note" spoken of was for either \$14,000 or \$14,192.72. It is submitted that any such argument or reasoning is wholly lame and fallacious. It is certainly a *non sequitur* that, because at one time the *value* of something is stated, the *price paid* at a subsequent time for the thing so valued must be, or even would be, necessarily the same. The plain sense of the situation here is that the buyer would acquire property worth what was stated; but what was *actually paid* for such property at a subsequent time was entirely a matter of independent contract *at the latter date*. In this case the only evidence bearing on the amount of the note in question is afforded by the *notice of sale* [Tr. pp. 56-57], in which the amount of the note is specifically stated to be \$7500, and it is conceded the sale was consummated. Very clearly, no other note is involved.

The foregoing assumptions petitioner treats as basic in his case, and even founds other assumptions upon them. For this reason they are specifically treated. Petitioner makes still other assumptions in the course of his brief, but these will be noted at appropriate places.

The remainder of this brief will be devoted to consideration, under the propositions appearing, of the petitioner's "Argument," beginning page 17. Prior thereto he devotes three pages to the announcement of certain statutory provisions which, in themselves, are unimpeachable, but which, as will appear, do not aid petitioner.

I.

Since Respondent's Claim Is Not Against the Bankrupt, or Against His Bankrupt Estate, Section 64 of the Bankruptcy Act Has, and Can Have, No Application.

Both in its claim and in its petition IMPERIAL precisely stated that it was asserting a right "against the *assets* of the said *Downey Wall Paper and Paint Co.*, a corporation" [Tr. p. 16]. Petitioner undertakes to claim that there is conflict between the claim and the petition (pp. 11-12). He says that the claim discloses no basis of equitable lien, but is merely an unsecured claim. In filing its claim in the bankruptcy proceeding IMPERIAL did not identify itself therewith, but merely resorted thereto, to assert its rights against the *Trustee* who held the funds. (*In re Plattville etc. Co.*, 147 Fed. 828, 831.) The filing of a claim is no waiver of any lien, even if the basis of the lien is not disclosed in the claim, provided intervention based on the claim comes in promptly. (*In re Zitron*, 203 Fed. 79, 82.) In this case IMPERIAL filed its claim and petition on the same day, October 19, 1939 [Tr. pp. 13, 18]. Nothing in the form or time of filing of its proceeding in this matter derogates from any of IMPERIAL's rights.

Under such circumstances it is submitted that it is vain to contend that Section 64 of the Bankruptcy Act can have any bearing whatever in the determination of IMPERIAL's rights. In that section, both by its own terms and by its place in the framework of the act (in the chapter on "Estates" of bankrupts) it is abundantly clear nothing but *assets in the estate of the bankrupt* are included, or designed to be brought into consideration under that section, whether "strictly construed" or not. It is submitted that the section is wholly immaterial for any purposes of this case, and it has been so held. (*In re Tressler*, 20 Fed. (2d) 663, 664.)

II.

Imperial Having Demanded to Deal With a Corporate Entity Before It Would Deal at All, That Entity Having Been Organized in Accord With Such Demand, and Imperial's Subsequent Dealings Having Been With Such Entity Exclusively, Imperial Had, as That Corporation's Sole Creditor at the Time of the Bankruptcy, an Equitable Lien or Charge on All the Assets of the Corporation, Which Lien or Charge, Resulting From the Undertakings and Dealings of the Parties, Was Superior to Any Right Which the Trustee in Bankruptcy Could Obtain in Any Manner.

Under this proposition will be considered the matters included in petitioner's brief between pages 29 and 45, wherein he variously contends that an "equitable lien" on personal property in California is "utterly impossible" (p. 20) and that what IMPERIAL is actually claiming is a "secret lien" (pp. 29, 36, 41, 42), to which the policy of the law of California is "wholly hostile" (pp. 29, 34).

Petitioner maintains that a lien on personal property is not only impossible but "is absolutely void" unless evidenced by some appropriate instrument, or the property is taken into continued possession. He relies upon the first paragraph of Section 3440 of the Civil Code and develops his theory of hostility to "secret liens" by reference (pp. 32-42) to a number of California cases. From this he draws the conclusion that IMPERIAL'S lien, even granting that it had one, was "a *secret lien*" and, therefore, wholly void—and he also adds "fraudulent"—and thereby without avail to IMPERIAL in this case. The doctrine which petitioner announces and the authorities which he presents is not, nor are they, in anywise disputed by IMPERIAL. On the contrary, they are cheerfully conceded,

with the comment, however, that they have nothing to do with this case.

Petitioner's difficulty again inheres in a mistaken assumption. His premise is that there can be no such thing as an "equitable lien" *created other* than as he states (p. 29). Such, however, is not the law of California, which, it is cheerfully conceded, is of first importance (p. 45). Petitioner ignores 16 *Cal. Jur.*, "*Liens*," section 10, pages 307-308, and the authorities there cited. He has now even abandoned "16 *Cal. Jur.*, chapter on liens, page 310; section 12," which he cited in his *petition* here (p. 22). Its opening sentence states: "*Unlike common-law liens, equitable liens do not depend upon possession,*" and refers to section 10, *supra*. Section 10 is cited in respondent's "reply" here (p. 12).

In section 10, *supra*, it is said:

"In equity a lien consists in the *right to subject the property, even though not in the possession* of lienor, to the payment of the debtor or claimant, *as a charge on the property*" (p. 307) and

"*A merely verbal agreement may create such a lien upon personal property. Equity looks at the final intent and purpose rather than the form, and if the intent appear to create a lien as security for an obligation, the lien follows. The fact that the agreement is executory is immaterial.*" (pp. 308-309.)

This text is sustained by numerous cases. The principles apply alike to real and personal property.

In one case where a lien was claimed upon shares of corporate stock on the basis of a certificate to which no paper title in the claimant appeared, it is said:

"Mr. Pomeroy, in his Equity Jurisprudence, says that a *merely verbal agreement* may create such a *lien on personal property*, enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees, and *purchasers or encumbrancers with notice*; and that equity looks at the final intent and purpose rather than the form, and if the intent appear to pledge certain property as security for an obligation the lien follows. (Pomeroy's Equity Jurisprudence, Secs. 1235-1237.)"

Hall v. Cayot, 141 Cal. 13, 18-19.

Pomeroy's announcement of principles, *supra*, has been many times approved and followed by California courts, as well as elsewhere, including this court.

McColgan v. Bank of California, 208 Cal. 329, 338;
U. S. v. Butterworth-Jordan Corp., 267 U. S. 387,
393, 69 L. Ed. 672, 677.

"Purchasers or encumbrancers *with notice*," *supra*, would include the recent creditors (1938) of Downey, upon whose assumed rights the petitioner pretends to rely in his brief here (p. 62). It does not appear that such relied upon the *corporation*; nor could they, after the recorded notice of 1936.

In the instant case the understanding and agreement between Downey and IMPERIAL—indeed, the sole condition on which IMPERIAL would have any dealings at all, in view of Downey's indebtedness—was that a corporation be organized, a separate "*entity*," to which IMPERIAL could

deliver its goods, to which *alone* it would look for an accounting thereof, and from which *alone* it would receive payment therefor. The corporation, Downey Co., was formed, and functioned as agreed for more than two years. At Downey's bankruptcy the corporation held goods, delivered, for the most part, by IMPERIAL, and IMPERIAL was its *sole* creditor. It is submitted it is clear, upon the principles above set forth, that IMPERIAL would have a *lien upon all the goods* above mentioned. It is vain to contend, as does petitioner (p. 61), that no lien was fixed on any particular "*portion*" of those goods. Since IMPERIAL was "*the only existing unpaid creditor*" of the corporation, as petitioner admits (p. 46), its lien would extend to all *assets* then found in the corporation's hands, to-wit, those taken by the petitioner, which the petitioner further admits (p. 64) were held by "that corporation" by "title" and by "possession."

In another case receivership was pending in an action for partition of personal property. A third party sought, by an order to show cause, a direction to the receiver to pay him a certain commission, on the theory that he held a lien upon the property in suit. But he did not intervene in the action, or file any petition whatever therein. Holding that his *pleading* was inadequate, and assuming that "the claimant relies on an *equitable* lien," the court quotes from 16 *Cal. Jur.*, section 10, *supra*, and says:

"Every *express agreement* upon a valuable consideration received whereby the contracting party

sufficiently indicates an *intention* to make some particular *property* therein described or *identified* a security for a *debt or other obligation*, creates an *equitable lien* upon the property.' ”

White v. White, 11 Cal. App. (2d) 570, at 574.

In the instant case the arrangement between Downey and IMPERIAL, whereby the corporation was formed to meet IMPERIAL'S condition precedent for an “entity” to which it could deliver its goods and from which it should thereafter collect their price, “indicates an intention” to make “the property,” the assets, of that corporation “a security for the debt” to be incurred by the delivery of goods, which assets, moreover, would, under the arrangement, consist primarily of goods of IMPERIAL, and did so consist at the time of Downey's bankruptcy, and which assets were thereby sufficiently “identified” for the purposes of an “equitable lien.”

Also, in *White v. White*, *supra*, the court quotes 18 *Standard Encyclopedia of Procedure*, page 1000, section C, as follows:

“Whenever the lien is a matter of *contract* between the parties, equity always has jurisdiction to enforce the same for *every such lien or charge in rem* constitutes a *trust* and is governed by the general doctrine applicable to trusts.’ ” (p. 574.)

This latter is in line with the general doctrine that, when the assets of a corporation are brought within the jurisdiction of a *court* for final administration, such are

then to be regarded as a *trust fund* for the benefit of the corporation's creditors. (*Delaney etc. Co. v. Crystal etc. Co.*, 88 C. A. 784, 792, quoting *Hollins v. Brierfield C. & I. Co.*, 150 U. S. 371, 384, 37 L. Ed. 1113, 1117; 4 *Thompson on Corporations*, 2d Ed., 39, Sec. 3421.)

It is submitted that, under *California law*, IMPERIAL very clearly had a *lien, charge or trust* upon the assets of the Downey Co. at the time of Downey's bankruptcy, and that the same persisted and pertained as a *prior charge* upon those assets and their proceeds in the hands of the petitioner. Only if there be a *surplus* can the petitioner's rights attach to *that*—under the procedure he elected to take. Possible surplus for the bankrupt estate over outstanding valid prior rights lies at the basis of the decisions petitioner cites (p. 64).

Petitioner himself cites authority that his claim may be thus subordinated to the "claims of other *creditors*, upon *equitable principles*." (*Pepper v. Litton*, 308 U. S. 295, 302-303, 84 L. ed. 281, 287.)

The foregoing principles are not peculiar to California, but are matters of general law. They have been expressly recognized by this court.

Hurley v. Atchison, T. & S. F. Co., 213 U. S. 126, 132-133, 53 L. Ed. 729, 733.

That case involved a bankruptcy, and the railroad intervened to establish "a preferential claim" to assets in the hands of the trustee (p. 127), "consisting in part of the money received for coal delivered to the railway company,"

and allowance of the claim was affirmed by this court. Under an oral agreement by the coal company to deliver coal to offset it, the railway company had advanced money to the coal company to assist it while it was embarrassed, but not yet in bankruptcy. Those advancements had never been satisfied, and they were made the basis of the railway company's "preferential claim." Regarding the agreement, and its result between the parties, this court says, page 132:

"To ignore this element and make the bankruptcy proceedings discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company, would result in destroying the full equitable obligations of the coal company, and place the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into the original arrangement."

Such principles, it is submitted, are exactly those which underlie the California decisions above referred to.

In the instant case, under an arrangement and agreement made more than two years before the bankruptcy, that the corporation to be organized, *not* the bankrupt, should be the sole party dealt with and should stand as its sole debtor at all times, IMPERIAL placed in the corporation's hands large amounts of its goods and, at the last, substantially all the assets the proceeds of which the trustee now holds, and against which assets IMPERIAL was the sole unpaid creditor of the corporation at the time

the trustee took them. Thus the trustee is holding the proceeds of property from which, but for his intervention, IMPERIAL would long since have obtained satisfaction of its claim for the goods it had delivered under the arrangement.

Petitioner himself provides a case which likewise recognizes such "equitable lien." (*United States F. & G. Co. v. Sweeney*, 80 Fed. (2d) 235.) Petitioner shows strange disinclination to become acquainted with this case, although he has consistently cited it. He has never yet learned that the part upon which he relies is *not* the *decision*, but is merely matter of *direction* to the trial court, in the event of retrial. What petitioner points to is unimpeachable law, but, by reason of the facts of this case, as noted in Point I hereof, it is here wholly inapplicable.

However, the *decision* is directly applicable, and sustains respondent. There the surety company was bondsman of a contractor who became bankrupt. It paid certain liens for labor and material and within four months received reimbursement from a fund belonging to the bankrupt. To recover this for the estate, the trustee brought action and obtained judgment. Reversing this, the court said, page 239 (6, 7):

"*Equitable liens*, if created *before* the four months period preceding bankruptcy, are valid and enforceable against the trustee, and they are not preferential even though the funds upon which they are a *charge* are collected *after* an adjudication in bankruptcy. *Voltz v. Treadway and Marlatt* (C. C. A. 6), 59

Fed. (2d) 643. If an *equitable lien* is created, it is *immaterial* that the formal ascertainment of the *specific beneficiary* was made within *four months* of the bankruptcy proceedings. *Johnson v. Root Mfg. Co.*, 241 U. S. 160, 165, 60 L. Ed. 934 (1915).

"(8) We conclude that appellant had a *valid equitable lien* against the funds which should be recognized and protected; and its *rights* had their *inception* at the time it *became surety* for the construction company."

Regarding the existence of a *lien* in a given case it is also said, "that in the *absence* of a controlling *statute*, the question is one of *general law*." (p. 239(9).)

In that case "a valid equitable lien" entitled the holder to first payment, where all claims were in reality made against the same debtor, the *bankrupt estate and its assets*. The principle would, it is submitted, apply all the more strongly here, where the "equitable lien" is held by one who is claiming against a *debtor wholly different* from the one (the bankrupt) in whose estate the funds claimed against have become lodged by a former procedure, under which, however, the *rights of respondent IMPERIAL* in those funds were *never* determinable or determined.

Respondent's "equitable lien" had its "inception" in the arrangement for the corporation, more than two years before. It is submitted it gave rights superior to any the petitioner trustee could acquire in the funds in question.

III.

Downey's Sale in 1936 to the Corporation, of Which Notice Was Duly Recorded, if Fraudulent at All, Was so Only in Respect to Then Existing Creditors, Who, However, Must Act With Due Diligence if They Would Protect Themselves Against the Intervening Rights of Subsequent Creditors; and Since Standard, Which Was Then the Only Creditor, With Full Knowledge of the Sale, Did Nothing Prior to 1938 to Challenge Such Sale or Seize the Property Transferred, But, on the Contrary, Received Substantial Sums Upon Its Claim, It Was Estopped in 1938 to Question the Transaction in 1936 and So Was the Trustee, While Downey's Recent Creditors Had No Standing at All.

Petitioner assumes and asserts that STANDARD was at all times a creditor of the Downey Company, by reason of the alleged fraud and the assumed participation of IMPERIAL therein (pp. 43, 44). Inasmuch as it has been shown that any such assumptions are unsound, no rights of STANDARD—*Downey's sole creditor in 1936*—or of the trustee through STANDARD could be worked out in that manner. The authorities cited by petitioner, resting as they do upon the basis of *actual* fraudulent conduct, affecting all parties, are necessarily without bearing (pp. 62-63). It has appeared that although it had knowledge, and although it was deriving benefits from the continued conduct of Downey's own business, STANDARD made no complaint until September, 1938. It does not appear STANDARD has offered to surrender any of the benefits received. Petitioner himself cites, and much relies upon (pp. 18, 32, 44, 63, 73), authority which establishes that, under such circumstances, STANDARD would certainly be

estopped. (*Buffum v. Barceloux*, 289 U. S. 227, 234, 77 L. ed. 1140, 1145.) In that case it is also noted that, under such circumstances, the trustee himself would be equally estopped. It is there held that the rights of creditors *other* than the one actually estopped, and the derivative rights of a trustee, would not be affected by the estoppel of the *one* creditor. In this connection, petitioner draws attention to the fact that, in the instant case, creditors of Downey other than STANDARD are here involved. [Tr. p. 62.] It appears, however that those creditors of Downey were all of recent date (1938). Necessarily, none of them dated back to 1936, when the transfer was made to the Downey Co. In the *Barceloux* case, however, the fact was that the "other creditors" referred to were some existing "at the time of the unlawful pledge," the matter in question there. (pp. 233-234 (1145).) *Their* rights might well stand upon a different basis, and *they* might not be debarred and, consequently, the trustee would not be—unless otherwise, laches or grounds of estoppel had intervened. Also, in that case, the creditor,—otherwise estopped,—had *surrendered* his benefits. The *Barceloux* case certainly does not support petitioner. Furthermore, in the instant case, the transfer to the Downey corporation was made by virtue of an express provision of the law whereby, if the terms of the statute requiring record of a notice of the sale were complied with, the *only* creditors who could complain were those *existing* at the time that the transfer provided for by the statute was made. (Civil Code of California, section 3440, second proviso.) Even though he were actually insolvent, if none of his creditors had actually intervened, and he was still conducting his business, he was authorized by law to transfer his assets. (Civil

Code of California, section 3431.) It is not claimed, and it is not the fact, that STANDARD, in 1936, was anything more than a general unsecured creditor. It is recognized in this court that, under such circumstances, a transfer of property may be validly made. (*Fogg v. Blair*, 133 U. S. 534, 540-541, 33 L. Ed. 721, 724.) Availing himself of the provisions of Civil Code, section 3440, above mentioned, Downey recorded the required statutory notice and made the sale of his wallpaper and paint property in July, 1936. It is to be particularly noted that this property was only a *portion* of that involved in Downey's business at the time, and it was not any part of that which concerned STANDARD, or was received from that company [Tr. p. 53], or was any property against which it had any right or claim—unless it should elect to secure such by some proper proceeding at law. In such circumstances the corporation to which those assets were conveyed could validly hold the same, particularly provided no steps were taken to challenge the transaction, and could so hold irrespective of the *amount* of consideration which the corporation gave, or the *manner and method* in which it agreed to deliver that consideration. It is submitted that at the time of the bankruptcy in 1938, under all the circumstances just considered, the title of the Downey Company, even to the assets received in 1936, would have been entirely sustainable if, in fact, any of those assets had still remained. The record, however, discloses that those assets had long since been disposed of, and that none of them remained in the hands of the corporation. [Tr. p. 61.] To meet this, petitioner contends that, nevertheless, he is entitled to the *value*, wherever he fails to recover the goods. This principle might be generally conceded, but it is wholly con-

tingent upon the establishment of a *right* to recover the goods themselves. That right, as has just been seen, did not here exist.

Research develops but two cases in bankruptcy which deal with any states of fact at all similar to those which are presented here. These are *Carroll v. Stern*, 223 Fed. 723, and *In re Alleman Hdw. Co.*, 158 Fed. 119. The latter is a decision by a District Court. Neither of these cases, so far as is found, have ever been disapproved or overruled. *Carroll v. Stern, supra*, is cited in *In re Routt Lbr. Co.*, 59 Fed. (2d) 29, 31 (C. C. 9), as affording no ground for the taking by a trustee in bankruptcy of the property in which third parties have any interest. Petitioner, of course, does not consider these cases, or even refer to them.

In *Carroll v. Stern, supra*, the claimant intervened in a bankruptcy proceeding into which had been taken assets of another corporation, not bankrupt. When the assets were so taken, however, the court ordered the very thing which was *not* done by the referee and the District Court in the instant case, to-wit, it ordered that the assets of the non-bankrupt corporation, which were brought in, should be *marshalled*, with first right of recourse to the creditors of the *non-bankrupt* corporation.

In that case it appears that the non-bankrupt corporation had been regarded as a "department" of the bankrupt, and that the claimant, on its books, had even carried the account as one for which the bankrupt *might* be ultimately liable. In these respects the instant case stands even more strongly in the claimant's favor. Here the non-bankrupt corporation was *never* regarded in any of IMPERIAL'S dealings as any "department" of the bankrupt

Downey, but was expressly looked to always as the *sole actor* in all the dealings. Also, IMPERIAL *never* at any time charged its account to the bankrupt, or looked to him in anywise for any payment. —

Regarding the bringing of the assets in question into the bankruptcy, the Circuit Court says (p. 725), such "was an unusual result. It has been acquiesced in and cannot be questioned." In the instant case, the situation is no less "unusual." But IMPERIAL is *not* bound by what was done in that regard, since it was never a party to the proceeding by which it was done. IMPERIAL has never "acquiesced," but has challenged and is challenging the rightfulness of the action taken by the trustee, so far as that action denied IMPERIAL'S *first right* of access to the assets which the trustee took from the Downey corporation.

Regarding the effect of what had been done in that case, the court further says, on the same page:

"* * * but the *bankrupt estate* who has thus presumptively *profited* from the exercise of such power, should *do equity* to the fullest extent. The bankruptcy trustee was ultimately entitled *only to the surplus* which should remain out of the Duhme assets *after* the payment of all *debts* which properly attached to those assets. Thus *this property came to the trustee charged with a prior trust*, and it was this prior trust which the first order and opinion of the district court undertook to declare. We see no reason for excluding from their language creditors who had dealt with the Duhme Co. as Stern Brothers had. Their right to be beneficiaries of the *trust* was of no less rank than that of other creditors who might have dealt with and known the Duhme Company only, but whose dealings had not operated to *create*

the trust fund. Creditors who received an order from the Duhme Co. and shipped their goods to the Duhme Co., and so contributed to the fund to be distributed, must be regarded as among 'those who dealt in good faith with that company' even though they might have supposed that the debt would be paid by the chief stockholder."

It is apparent, that the principles of this case extend far beyond anything that is required to sustain IMPERIAL'S rights against the assets which the trustee has taken in this case. The case also brings out the matter of a "trust" protecting creditors, which has been considered in connection with respondent's "equitable lien."

The *Alleman Hardware Company case, supra*, involved a transfer of goods, which was fraudulent as to existing creditors, and those creditors were chargeable with notice. Thereafter, the goods were transferred to a corporation formed by all of the parties to the fraudulent transfer. This concern operated for three years, and new goods were acquired, and new indebtedness incurred,—although a part of the goods originally transferred still remained in its hands. The original creditors meanwhile did nothing. In the bankruptcy of the corporation, the original creditors sought to claim, on the ground of the original fraud. Their petition was wholly denied, since there was no possibility of any surplus whatever. The court says, page 120:

"But whatever right of seizure or reclamation the creditors of L. M. Alleman might have had, if asserted at the time, they, of course, had no lien upon the goods, and after the organization of the company, and the intervention of others, the goods became the property of the company and liable for its

debts, whatever might be said of them before, and that is *necessarily the controlling consideration* here. Nor is this affected by the fact that the *capital stock* of the company is still practically in the hands of the parties to the original fraud. *If* they alone were concerned, it may be that the creditors of L. M. Alleman, who suffered by the covinous arrangement, would still have the right to have the property treated as his. *But that is not the case.* The rights of the *creditors* of the company *are to be kept constantly in mind*, having regard to which the identity of L. M. Alleman with the L. M. Alleman-Company, by reason of the continuing fraud, cannot be maintained."

Dismissing the claim that "laches are not to be imputed," because the creditors did not know of the conditions, which knowledge, however, the court says could have been "effectively obtained," the court continues, page 121:

"It is to be noted, moreover, that, the present petition is refused not so much upon the ground of laches as *out of regard for the rights of creditors of the Hardware Company* who are clearly entitled to the *first concern.*"

In the instant case, the sole creditor, STANDARD, had knowledge of all that went on, from the very beginning. It had such knowledge, as matter of law, by reason of the record of the notice of sale by Downey to the corporation. Such record is notice "to all the world." (*Thompson v. Fairbanks*, 196 U. S. 516, 527, 49 L. Ed. 577, 587.) Such is the very object and purpose of the making of any such a record. Furthermore, it is directly in evidence that Downey had advised STANDARD concerning the organiza-

tion of a corporation, both before and after it was organized [Tr. pp. 56, 59]. In the instant case, the very assets seized and sold, for the most part, came from IMPERIAL. It had delivered them to the Downey Company. The business done extended over a period of more than two years. The business and affairs of the corporation, although conducted at the same location, were, unqualifiedly, at all times kept and maintained wholly separate and distinct from the business of Downey himself in which STANDARD was interested [Tr. pp. 60-61]. During this whole period, with the knowledge above mentioned, STANDARD took no steps whatever, even to question anything that had been done. It was content to allow everything to proceed,—so long as it was receiving from Downey, as it did receive, substantial sums of money on its own claim, amounting by its own statement to \$21,006.72, and interests, by April 15, 1938 [Tr. p. 181]. No part of this is offered to be surrendered. No allowance is tendered even for the admitted \$5,000, "cash", paid by Downey Company on the \$7,500 note. (Sec. 70-d, Subd. (1), Bankruptcy Act.) Under such circumstances, the fundamental principles of all of the cases above cited,—which so carefully preserve the rights of those who contributed to the creation of the property and funds involved,—certainly require that the claim and the petition of IMPERIAL in the instant case be held well founded; and their recognition by the Circuit Court was entirely proper.

In view of all of the foregoing, it is submitted that petitioner's claim, based alike upon the assumption of fraud, and of the right to recover the property or its value from the Downey corporation, inhered neither in STANDARD, nor in the trustee in bankruptcy, to the exclusion of respondent.

IV.

Since the Trustee's Proceeding Was Merely to Determine That the Corporation Was Downey's Alter Ego, and Imperial Was Not Made a Party Whereby It Was or Could Be Adjudicated That, as to Imperial, the Corporate Entity Should Be Disregarded, the Proceeding Had Was in No Sense Per Se the Equivalent of an Action Under Section 70-e, to Recover Assets of the Bankrupt, Exclusively for the Benefit of the Bankrupt Estate.

This matter has been substantially covered in what has been said hereinbefore. However, the insistence of petitioner upon the efficacy of the *alter ego* procedure, and of the order of the referee made therein—directing as it did seizure of the goods of the Downey Company and their sale thereafter for the benefit of the bankrupt estate,—it is deemed desirable to still further clarify the situation.

It is submitted the most striking thing in the brief of petitioner is, that he has not seen fit to deal with, or even to mention, the opinion of the Circuit Court regarding the bearing of the *alter ego* proceeding in this case, and the necessity of the existence of clear and cogent grounds for a *disregard* of the corporate entity, before the *alter ego* proceeding itself would have the least bearing upon anything which is here involved. The Circuit Court so states in plain and direct terms [Tr. p. 209]. It cites authorities, both in the state of California, and in the Ninth Circuit, all establishing the necessity of the exis-

tence of clear grounds of "fraud, injustice or inequitable results" to permit, much less require, the disregard of the entity which exists in legal fact, even if it were "a one man corporation." Nevertheless, this matter is not alluded to.

Neither is the court's final decision in that regard either denied or sought to be modified, restricted, or altered in any respect [Tr. p. 210]. That final holding of the Circuit Court was that this *respondent* would suffer grave injury, if, in this case, the corporate entity should be disregarded. In the last analysis, all that this case comes to is, a recognition that the corporate entity here should *not be disregarded* to defeat this respondent. It must still remain true that one has a right to select the particular party, or "entity", with which he will deal. It must therefore follow, that, if he makes such selection and his election is accepted by all parties in interest, and carefully observed at all stages of future transactions, all benefits of this selection and election must be conceded to the party who has made it. In this case, there can be no question but that IMPERIAL demanded a corporation be formed, before it would have any dealings whatever with which Downey should be connected. It is not disputable that the corporation was formed, and that IMPERIAL dealt with it exclusively. It, therefore, cannot well be denied that when, as a result of those dealings, at the time of the bankruptcy the corporation was found in possession of assets, the most of which at least had come directly from IMPERIAL, that IMPERIAL should have, upon all considerations

and principles of equity, justice, and fair dealing, the first right of access to that property in the hands of that corporation, of which IMPERIAL was then the sole remaining creditor. Any and all rights of the trustee petitioner must be postponed to this, and depend wholly upon the existence of a surplus.

It is respectfully submitted that, in whatever disposition of its writ herein this court may deem it fitting to make, the judgment of the Circuit Court should be and remain wholly undisturbed. /

Respectfully submitted,

HIRAM E. CASEY,
Attorney for Respondent.

HORACE W. DANFORTH,
Of Counsel.

BLANK PAGE